

BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR EXTENSION OF TIME TO PERFECT)
BENEFICIAL WATER USE PERMIT)
NO. 42665-g41F BY FIRST MADISON)
GEOTHERMAL)

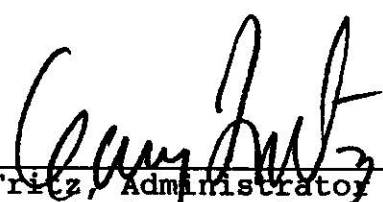
FINAL ORDER

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On May 10, 1989, a Correction and Notice of Right to Except was served upon all parties of record granting 20 days from the date of May 10, 1989 to except to the Memorandum Regarding Dismissal of Objection issued on April 4, 1989. There being no exceptions filed in this matter, and good cause appearing,

IT IS ORDERED that on Application for Extension of Time approving the additional time to complete the project to November 30, 1989, is hereby granted.

Dated this 9 day of June, 1989.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

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CERTIFICATE OF SERVICE

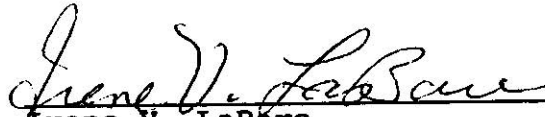
This is to certify that a true and correct copy of the foregoing Order was duly served upon all parties of record at their address or addresses this 12th day of June, 1989, as follows:

Montana Rose and Floral, Inc.
P.O. Box 545
Ennis, Montana 59729

William Thexton and Helen Thexton
5032 U.S. Highway 287
Ennis, Montana 59729

Bruce Loble
Attorney at Law
P.O. Box 1145
Helena, Montana 59624

Scott Compton, Field Manager
Bozeman Field Office
1201 East Main
Bozeman, Montana 59715


Irene V. LaBare
Legal Secretary

BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR EXTENSION OF TIME TO PERFECT)	
BENEFICIAL WATER USE PERMIT)	CORRECTION AND
NO. 42665-G41F BY FIRST MADISON)	NOTICE OF RIGHT TO EXCEPT
GEOTHERMAL)	

* * * * *

The Memorandum issued by this Examiner on April 4, 1989 incorrectly denominates the action taken regarding the Thexton objection to the above-captioned application as a Dismissal of Objection, when the action taken was in actuality a Summary Determination.

There were no factual issues raised by Objector, and thus there was no need for a hearing to decide same. However, Objector did raise a bona fide legal issue. Although the Examiner held that Objector's legal interpretation was incorrect, the Objection was not of such insubstantial nature as to require dismissal. Rather, the action taken was a summary determination of a contested case involving a legitimate objection, and should have been denominated, and dealt with, as such.

Contested case decisions are first issued as Proposals for Decision. Therefore, the action taken was, and should have been entitled, a Proposal for Summary Determination. Accordingly, Objector Thexton has a right to except to the Proposal.

WHEREFORE, it is hereby ordered that Objector Thexton have 20 days from the date hereof to except to the Proposal (the

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substance of which is incorporated in the April 4, 1989
Memorandum) and to request oral argument thereon.

Dated this 10 day of May, 1989.



Robert H. Scott, Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the
foregoing Correction and Notice of Right to Except was duly
served upon all parties of record at their address or addresses
this 11th day of May, 1989, as follows:

Montana Rose & Floral, Inc.
P.O. Box 545
Ennis, Montana 59729

William Thexton and
Helen Thexton
5032 U.S. Highway 287
Ennis, Montana 59729

Bruce Loble
Attorney at Law
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Helena, Montana 59624

Scott Compton
Field Manager
Department of Natural Resources
and Conservation
1201 East Main
Bozeman, Montana 59715


Irene LaBare
Legal Secretary

original/file
BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR EXTENSION OF TIME TO PERFECT)	MEMORANDUM REGARDING
BENEFICIAL WATER USE PERMIT)	DISMISSAL OF OBJECTION
NO. 42665-G41F BY FIRST MADISON)	
GEOHERMAL)	

* * * * *

The purpose of use, place of use, place of diversion or place of storage of water, for the appropriation of which a permit has been granted, may be changed by filing an application for change, even though the permit has not yet been perfected. Section 85-2-402(10), MCA. Applicant herein has not perfected the appropriation as originally permitted, but applied to change the purpose of use on July 22, 1988. This Change Application was being processed by the Department at the time that the Notice of Completion for the original permit came due. Accordingly, Applicant filed the captioned Application for Extension of Time to Perfect. A temporary extension was granted. The Change Authorization was issued February 6, 1989.

Information sworn to by Applicant in its Extension Application shows prima facie that it has exercised due diligence in appropriating water for the changed use, i.e., a fish pond. Objector Thexton did not aver facts in its Objection hereto relevant to Applicant's (lack of) diligence regarding the fish pond appropriation. Rather, Thexton objects to the extension evidently arguing that diligence toward effecting the fish pond use cannot be considered diligence for purposes of the requested

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extension, because the Change Authorization had not been granted prior to the extension request and because Permittee had not worked to perfect the Permit as it existed at the time extension was applied for.

Objector is in error. Diligence toward perfection of an appropriation, albeit with changed purpose of use for which a change application has been filed, is sufficient cause to grant an extension, even if the diligence is exercised before official approval of the application for change is received.


A permittee who finds that the purpose of use originally permitted is not practicable, and files for a change in such purpose, would be in quite a dilemma if the time required for the change to be approved might exceed the time remaining for perfection under the permit as originally issued, were the Department to apply the standard suggested by Objector. Under such standard, if the permittee were to wait for the change approval, and it was delayed, an applied-for extension could be denied for failure of due diligence. Of course, the permittee could try to perfect the impracticable purpose of use of the original permit simply to qualify for an extension. However, that would result in a waste of his resources. Objector's proposed standard thus leads to the oppressive result that the permittee must choose between gambling he will have time to perfect the permit after he obtains change approval (a process which can involve a substantial amount of time, especially if

there are objections), or wasting effort and money diligently pursuing an impracticable use.

The only conceivable justification for Objector's assertion is that the appropriator should not retain the original priority date if the appropriation which is ultimately made does not "relate back", through continuity of intent, to the date of application. Continuity of original intent may have been required at the common law; however, § 85-2-402(10), MCA, makes it clear that the appropriator's intent does not have to remain as it was at the time of his application for the original permit in order for the priority date of the appropriation to relate back to the date of application. Certain alterations, listed in this subsection, may be made "midstream". "Relation back" thus provides no justification.

The Thexton Objection is without any evident basis, factual or legal; accordingly, said Objection has been dismissed.

Dated this 4 day of April, 1989.


Robert H. Scott, Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625